IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-656

MACHIPONGO CLUB, INC., *Petitioner,*

v.

THE NATURE CONSERVANCY, *Respondent.*

RESPONDENT'S BRIEF IN OPPOSITION

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Respondent, The Nature Conservancy, respectfully requests that this Court deny the petition for writ of certiorari to review the Fourth Circuit's decision in this case.

REASONS WHY THE WRIT SHOULD BE DENIED

1. The Questions Presented By The Petition Involve No Conflict Of Decisions Nor Any Question Of Public Importance

Although the petition for certiorari states that three questions are presented for review in this case, the petition notably does not suggest that any of the issues warrant full review by this Court. Instead, the petition asks this Court to reverse the Court of Appeals summarily without briefing or argument and to direct the courts below to abstain from exercising jurisdiction.

Petitioner's failure to seek plenary review in this Court is not surprising because the questions presented are narrow issues which have no public importance, and the decisions below do not conflict with any decision of any other court, state or federal.

The first two questions presented by the petition are narrow, fact-bound easement and right-of-way issues that turn upon state rather than federal law. Respondent submits that these easement and right-of-way questions were correctly decided in the courts below. Even if the decisions below were in error, however, the existence or non-existence of any easements or rights-of-way on an uninhabited island off the coast of Virginia plainly is not a matter that warrants full consideration by this Court.

The third question presented by the petition—the propriety of the lower court's decision not to abstain with respect to the easement and right-of-way questions—also fails to warrant plenary review in this Court. The standards for applying the abstention doctrine in diversity cases were first articulated by this Court in *Meredith* v. *Winter Haven*, 320 U.S. 228 (1943). As the Court then stated, abstention is not appropriate in diversity cases merely because the action turns upon difficult questions of unresolved state law. Instead, abstention is appropriate only when the case presents exceptional circumstances of overriding public policy, such as those presented in *Pullman*[1] or

[1] Railroad Commission v. Pullman Co., 312 U.S. 496 (1941) (abstention where definitive resolution of state law question could make decision of federal constitutional claim unnecessary).

Burford[2] type situations. 320 U.S. 234-235. In the twenty-five years that have elapsed since this Court's decision in *Meredith*, the lower federal courts have not encountered any difficulties in determining when to abstain in diversity actions. The decision of the Court of Appeals in this case was entirely consistent with the well-developed body of lower court case law regarding abstention in diversity cases. As a consequence, there is no conflict of lower court decisions nor any other reason of public importance that would warrant plenary review by this Court.

2. Petitioner's Request For Summary Reversal Of The Court Of Appeals Decision Is Without Merit

Federal court abstention necessarily entails substantial delays, additional costs, and duplicative litigation for the parties involved. As a consequence, abstention is a procedural device that is properly employed only where significant public policy considerations outweigh the added burdens and costs that abstention necessarily entails. The proceedings below in this case raised two issues—the statutory commons issues regarding marshlands and the shores of the sea—which arguably did involve public policy considerations of sufficient doubt and public importance to warrant abstention. The easement and right-of-way questions, however, plainly were not of similar importance. These latter questions were typical real property disputes with little or no significance to anyone beyond the parties themselves. The factual record relevant to the easement and right-of-way claims was fully developed in the courts below, and

[2] Burford v. Sun Oil Co., 319 U.S. 315 (1943) (abstention where federal court decision of state law question could seriously disrupt a complex state regulatory scheme).

there was no substantial dispute about the applicable state law. Moreover, since respondent allows and encourages the general public (including petitioner) to fish from, swim from, hike upon, birdwatch on, and generally use all of its lands on Hog Island *by foot*, the only real dispute presented by petitioner's easement and right-of-way claims was whether petitioner's members, guests, and employees would have to walk or travel by boat [3] when using respondent's lands. Under these circumstances, abstention with respect to the easement and right-of-way claims plainly would have been inappropriate.

3. Petitioner Did Not Raise Or Argue In The Courts Below The Abstention Question Presented In Its Petition

It is well established that this Court ordinarily will not entertain questions that were not raised or considered in the courts below.[4] In this case, petitioner did not raise or argue the question of abstention in the District Court. Nor did petitioner brief or argue abstention on

[3] Petitioner owns an abandoned Coast Guard lifeboat station on the western shore of the north end of Hog Island. It is undisputed that petitioner has access by boat to its own property as well as to the property of respondent. It is also undisputed that there is no means of external access to any part of Hog Island except by boat. The dune buggies and other vehicles used by petitioner on Hog Island were transported to Hog Island by barge sometime after the petitioner acquired the abandoned Coast Guard station in 1966.

[4] *E.g.*, United States v. Lovasco, 431 U.S. 783, 788 n.7 (1977); United States v. Ortiz, 422 U.S. 891, 898 (1975); Ramsey v. United Mine Workers, 401 U.S. 302, 312 (1971); Adickes v. Kress & Co., 398 U.S. 144, 147 n.2 (1970) ("Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them."); Neely v. Eby Construction Co., 386 U.S. 317, 330 (1967); Lawn v. United States, 355 U.S. 339, 362 n.16 (1958) ("Only in exceptional cases will this Court review a question not raised in the court below.").

the merits before the Court of Appeals.[5] Petitioner first suggested the possibility of abstention in its petition for rehearing *en banc*. Even then, petitioner did not specifically urge abstention with respect to the easement and right-of-way issues. Instead, petitioner's request for rehearing *en banc* specifically urged abstention only with respect to the statutory commons issue regarding the "shores of the sea." The petition notably did not address the question now urged upon this Court, namely, whether the Court of Appeals could or should abstain with respect to the statutory commons issues without also abstaining from decision of the easement and right-of-way claims. Having failed to raise its abstention claims in the courts below, petitioner's request for certiorari regarding these claims should be denied.

To the extent that petitioner is seeking to have this Court summarily correct what petitioner perceives to be an error in the Court of Appeals mandate, it should be noted that petitioner never asked the Court of Appeals for such a correction. Nor did the petitioner ever move for a stay of the mandate.

4. Petitioner Has No Standing To Raise The Abstention Questions Argued In Its Petition

The basic cause of action in this case was trespass. Petitioner essentially admitted entry and use of respondent's lands. Insofar as petitioner's entry and use involved dune buggy riding and other vehicular use,

[5] The Virginia Attorney General filed an *amicus curiae* brief in the Court of Appeals which did seek abstention, but only with respect to the statutory commons issue regarding the shores of the sea. Petitioner did not join in even this limited suggestion of abstention in either its merits brief or its oral argument before the Court of Appeals. *See also* note 6, *infra*.

petitioner defended its conduct by claiming an affirmative right to use what it alleged were private easements, rights-of-way, or public roads on Hog Island. Petitioner expressly requested both the District Court and the Court of Appeals to grant injunctive relief and a declaratory judgment that it had a private or public right to continue its use of dune buggies and other vehicles on respondent's lands. Since petitioner was the party who raised the easement and right-of-way questions and pressed for their adjudication, petitioner has no standing to argue now that the courts below should have abstained from deciding these issues.

The only party that might have had standing to urge such abstention was the Virginia Attorney General; and the Virginia Attorney General expressly stated that the Commonwealth's interests were limited to the statutory commons issues.[6]

5. The Petition Should Be Denied Promptly To Avoid Confusion In The State Court Proceeding

The original panel decision in this case was rendered on March 2, 1978. Two weeks later, petitioner filed a petition for rehearing *en banc*. On March 22, 1978, the Court of Appeals authorized respondent to file a response to petitioner's petition for rehearing *en banc*. On April 5, 1978, respondent filed its response to petitioner's petition for rehearing *en banc*. On May 16,

[6] The Virginia Attorney General has intervened as a party in the state court proceedings discussed *infra*, at pp. 6-8. As in the federal proceedings, the Virginia Attorney General has not taken any position in the state court action regarding the easement, right-of-way, and public road claims. Instead, the Virginia Attorney General has limited his arguments in state court to the statutory commons issues regarding the marshland and the shores of the sea.

1978, while petitioner's petition for rehearing *en banc* was still pending, counsel for petitioner filed an action in state court on behalf of nineteen individuals closely related to petitioner Machipongo Club. *Bradford, et al.* v. *The Nature Conservancy, et al.*, Chancery No. 16 (Cir. Ct., Northampton County, Virginia). This action seeks declaratory and injunctive relief upon the same claims that were advanced by petitioner in the Federal proceedings in the courts below.

In September and October 1978, the state court heard testimony and preliminary argument in *Bradford, et al.* v. *The Nature Conservancy*. The evidence and arguments presented in state court were substantially identical to the evidence and arguments presented in petitioner's case in federal court. In particular, the state court plaintiffs introduced evidence and advanced arguments to show that petitioner Machipongo Club owns the private easements and rights-of-way which Machipongo Club attempted unsuccessfully to establish in the federal proceedings below. Although petitioner Machipongo Club is not a party to the state court proceedings, the state court plaintiffs have argued that they are entitled to use any private easements and rights-of-way owned by Machipongo Club because Machipongo Club has given them permission for such use. To support their claims deriving from Machipongo Club's alleged easements and rights-of-way, the state court plaintiffs rely upon an unrecorded written conveyance that Machipongo Club executed on September 18, 1978. This unrecorded conveyance purports to grant to one of the state court plaintiffs an irrevocable license to use any private easements or rights-of-way that may be owned by Machipongo Club.

In the state court proceedings, respondent has argued that the state plaintiffs' claims of private easements, rights-of-way, and roads are barred by *res judicata* to the extent that the claims derive solely from Machipongo Club. Counsel for the state court plaintiffs and petitioner Machipongo Club has responded to this argument by stating that the federal proceedings will not be final with respect to the easement and right-of-way questions until Machipongo Club's petition for certiorari is denied.

The state court proceeding is now being briefed on the merits. The state trial court has scheduled final oral argument and submission of the case for December 7, 1978.

Respondent respectfully submits that petitioner's request in this Court for a writ of certiorari is designed solely to confuse the state court proceedings by delaying as long as possible the finality of the judgment it sought and lost regarding its claims of private easement and right-of-way. Respondent therefore urges this Court to deny the petition for certiorari and to do so prior to December 7, 1978, the date of final argument in the state trial court proceedings. Such a denial would preclude the state court plaintiffs from relitigating Machipongo Club's claims of private easements and rights-of-way and would properly focus the state court proceeding upon the nonderivative easement and public roads claims that the state court plaintiffs are advancing in their own right.

CONCLUSION

For the foregoing reasons, respondent requests that this Court deny the petition for certiorari and that it do so before December 7, 1978.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of November, 1978, I served the foregoing Respondent's Brief In Opposition by depositing three copies in the United States mail, first-class postage prepaid, to each of the following:

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